

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
3 AT HUNTINGTON
4 TRANSCRIPT OF PROCEEDINGS
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8 IN RE: ETHICON, INC., PELVIC
9 REPAIR SYSTEM PRODUCTS LIABILITY MDL NO.
10 LITIGATION 2:12-md-2327
11
12

13
14 MOTION HEARING

15 JUNE 13, 2014

16 BEFORE THE HONORABLE **CHERYL A. EIFERT,**
17 UNITED STATES MAGISTRATE JUDGE
18

19 Sidney L. Christie Federal Building
20 845 Fifth Avenue, Room 109
21 Huntington, West Virginia 25701
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23
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A P P E A R A N C E S

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computer.

—Motion Hearing—

1 PROCEEDINGS had before The Honorable Cheryl A. Eifert,
2 Magistrate Judge, United States District Court, Southern
3 District of West Virginia, in Huntington, West Virginia, on
4 June 13, 2014, at 10:00 a.m., as follows:

5 THE COURT: Good morning.

6 RESPONSE: Good morning, Your Honor.

7 THE COURT: In re: Ethicon, Inc., Pelvic Repair
8 System Products Liability litigation, Case Number
9 2:12-md-2327.

10 Counsel, please note your appearance.

11 MR. ANDERSON: Ben Anderson for the plaintiffs.

12 MR. WALKER: Erik Walker for the plaintiffs.

13 MR. THOMAS: David Thomas for defendants, Your Honor.

14 THE COURT: Thank you.

15 Okay. I have read all of the materials and let me
16 tell you what I'm thinking, and then I'll let you all say
17 whatever you want to say.

18 So, I think we all agree that any tissue that's
19 removed that might include the mesh is going to be evidence,
20 correct?

21 MR. ANDERSON: Correct.

22 MR. THOMAS: Yes.

23 THE COURT: And most likely will be critical
24 evidence, maybe not always, but likely in some cases; we don't
25 know which. Would you agree?

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1 MR. ANDERSON: Some cases, it may be --

2 THE COURT: Yes.

3 MR. ANDERSON: -- additional evidence of pathology.

4 MR. THOMAS: We certainly believe it's critical
5 evidence, Your Honor.

6 THE COURT: All right. We don't agree, as I
7 understand it, that the plaintiffs have control over it. I
8 think the defendant says that the plaintiffs do have control
9 over it; plaintiff says plaintiffs do not have control over
10 this evidence. Right?

11 MR. ANDERSON: Yes, Your Honor.

12 THE COURT: I'm going to tell you that I looked at
13 your argument regarding the medical records and I don't agree
14 with that argument, and I'll tell you why I don't agree with
15 it.

16 I think that tissue is completely different from
17 medical records because my understanding of medical records is
18 that those records belong to the medical provider. The
19 medical provider creates the records. It's the thought
20 process of the medical provider. And from the beginning of
21 time, those records have belonged to the medical provider.
22 The patient has had an interest in the record, since the
23 record is about the patient, but it's always been the work
24 product of the provider. And so that makes records a little
25 different, in my mind, than, for example, my tissue taken out

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1 of my body. Even though the medical provider removes my
2 tissue, that was always my tissue. It wasn't something a
3 physician created. So I think they're different, and I don't
4 think that that argument on medical records is very
5 persuasive.

6 I understand, though, once the tissue is removed,
7 where the plaintiff is coming from as far as the control.
8 However, from my experience, when you have a foreign body
9 removed from a patient, generally, the medical provider, the
10 hospital or the surgical center, doesn't really, after a
11 certain period of time, want that foreign body, and they'll
12 toss it. And they're more than happy to turn that over to the
13 patient or to anyone that the patient says can have it. So,
14 for all intents and purposes, the patient does have the
15 ability to control that foreign body. So, from that
16 standpoint, I do think in this case the patient would have the
17 best control over that, if you're looking at the control the
18 defendant would have versus the control that the patient would
19 have. So, there's that issue.

20 Now, the duty to preserve it. You know, obviously, I
21 think there is a duty on the person who has it to preserve it.
22 I don't think we can make the hospital or the surgical center
23 or the medical provider do that. That's just too much to ask.
24 And I don't think they would otherwise have a duty to preserve
25 something like that. It's not something that by federal or

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1 state law they would normally have to retain for very long.
2 It's not like, for example, a slide or a cytology specimen.
3 It would be something they could normally toss. So I do think
4 somebody has the duty to preserve it, and that's where I think
5 we're going to have probably the grayest area.

6 And I'll tell you, I'll tell you why I think that's a
7 gray area, because I thought about this for a long time. And
8 the way I see it is the person who is going to know, first of
9 all, that the specimen even exists is the patient. So I
10 think, from the very beginning, that the patient here in this
11 case, the plaintiff, has the duty to notify her attorney that
12 she's having a surgery that's going to involve the removal of
13 tissue that might include a foreign body or just have the
14 foreign body removed, but in some way, she's going to have to
15 notify her attorney that she's having this surgery and that
16 the mesh might come out as part of the surgery. And I think
17 that there's just no way around that. There's no way
18 Ethicon's going to know, out of these thousands of women, who
19 is going to have the surgery to have the mesh removed. Right?

20 MR. ANDERSON: Correct.

21 THE COURT: There is no way you're going to know
22 that, Mr. Anderson. You have no way of knowing that. So
23 these -- these women are going to have to tell whoever they've
24 signed up with, whoever their contact is, that they're having
25 the surgery, right?

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1 MR. ANDERSON: Correct.

2 THE COURT: Then somebody's going to have to notify
3 the hospital laboratory or the surgical center. I assume
4 those are the primary places these procedures are being done.
5 I doubt that anybody's doing these in an office, are they?

6 MR. ANDERSON: You are correct.

7 THE COURT: So somebody's going to have to notify the
8 laboratory or the pathology department of one of these centers
9 or hospitals that there is an interest in having this foreign
10 body, and I would think that probably needs to be the patient.
11 So who's that going to be, the patient or the patient's
12 attorney? To me, it's probably going to need to be the
13 patient's attorney since if I were the patient's attorney, I
14 wouldn't want to rely on my client to do that. That's big,
15 you know. You know, I mean, you could, but you'd be running a
16 risk. So that gets us to step number two. Then where do we
17 go from there?

18 I don't think you can tell the hospital or the
19 surgical center how to handle the specimen. Most of those
20 places have policies in place already. And I can tell you
21 from having worked in a hospital, the last thing I would ever
22 do as an attorney for a hospital was have some attorney from
23 outside telling me how to tell my pathology department to
24 handle a specimen, because the policies were created within
25 the hospital after a lot of time and effort and research and

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1 committees, and the policies were created so that there was
2 one way to do it that everyone followed, and we did it that
3 way because we didn't want a lot of deviation. Every time you
4 deviate from a policy, that's where error gets introduced. So
5 we wanted a -- we wanted some sort of process that everybody
6 followed every time, and we insisted on that so that we could
7 reduce error. So I would not have allowed, for example, my
8 client to have accepted somebody else's policy on how to
9 preserve a specimen. I would have said this is the way we do
10 it, this is the way we're going to do it.

11 So all of these -- and when I've signed these orders
12 in the past in these other MDLs, I saw all that stuff and I
13 thought to myself, you know, I just don't think anybody's
14 going to follow that, any of these hospitals. I mean, there
15 were these very long, complicated forms that you wanted
16 signed, and I thought, you know, but if both sides agreed to
17 it, I wasn't going to interject and say no, I'm not going to
18 let you do it that way. I mean, if you had reached an
19 agreement, then perhaps you could find some hospital out there
20 who might be willing to follow it, then I wasn't going to tell
21 you you couldn't do it. But I would be surprised if any large
22 facility would follow that, and I don't -- you know, I don't
23 know how you could make them, quite honestly. So my guess
24 would be that most of these places are already going to have
25 policies in effect, don't you think?

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1 MR. ANDERSON: Yes, Your Honor, and that's been part
2 of the problem and one of the -- part of the genesis of us
3 coming to you -- is it okay if I sit with you today?

4 THE COURT: Absolutely.

5 MR. ANDERSON: Thank you.

6 We have hospitals that are saying wholesale rejection
7 of something that is akin to the letter that the defense put
8 as Exhibit B or A to their motion because they say we already
9 have policies in place. My background is like your own. I
10 represented the entire County of Los Angeles health system, 13
11 facilities. We would never let attorneys dictate to us what
12 would happen, because of error, because of liability, because
13 of manpower, et cetera, et cetera.

14 THE COURT: Right.

15 MR. ANDERSON: So we have, in a number of instances,
16 in response to both the bar and the AMS orders, we have
17 hospitals that are saying, "We're not going to follow the
18 procedures," and we say, "It's a federal order." They say,
19 "Too bad. We have a procedure in place, you know, we will
20 have our lawyers contact you," et cetera. So we have folks
21 who are just wholesale rejecting it, wholesale ignoring it.

22 And that's why, Your Honor, we brought you Kate
23 Grayson's affidavit because we did want you to see in terms of
24 boots on the ground when we had this question mark of -- that
25 you had, when you signed those orders thinking I just don't

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1 see this happening, in fact, it's not, and it's created a huge
2 problem, which is why we had proposed a protocol which was to
3 say, when we reach out to ask that these be preserved, let's
4 have something in place that says follow your own procedures
5 but alert us so that we can then bring it and put it with a
6 third-party facility who can then follow some of these steps
7 that we can agree upon, as were laid out in Mr. Thomas's
8 letter with the Tracey Law Firm. But let's not put that onus
9 on the hospital.

10 THE COURT: I --

11 MR. ANDERSON: Let's put that on an outside --

12 THE COURT: I'll let you talk.

13 No, I agree. I agree with that. I think -- I don't
14 think that, now that it's brought in a motion form, that I
15 would ever enter an order telling a hospital or a surgical
16 center that they had to follow a certain protocol in
17 preserving a surgical specimen. I don't think I have the
18 authority to do that, nor would I feel that I should do that
19 because they do have policies, they're supposed to have
20 policies, most of them, and I wouldn't -- I wouldn't ever try
21 to interject myself into that.

22 So, you know, I think that brings us then up to what
23 I consider step number three. You've got the plaintiff
24 notifying her attorney that she's having a surgery, you've got
25 the plaintiff's attorney notifying the facility that they're

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1 going to want this specimen whenever they can get it. The
2 hospital's probably going to have to follow certain steps
3 before it can be released. Generally, those specimens don't
4 have to be examined by a pathologist when they're just a
5 removed foreign body unless they're considered a defective
6 medical device, and I don't know that's the case with this
7 mesh or not. There is different rules that apply. If it's
8 just considered a foreign body like, you know, a tube that's
9 left in or something, then they don't even look at them half
10 the time. But they do need to decontaminate them because it
11 would be considered a biohazard coming out of someone's body,
12 and that takes a certain amount of time, and then they, you
13 know, have just their own protocol that they would follow.
14 So, they're going to preserve it in whatever medium they
15 preserve it in. Sometimes it's nothing. They just stick it
16 in, you know, a dry container. And I don't know that
17 anybody's going to have any control over that. So that's step
18 number three. So now we are at step number three.

19 Now, someone's going to get it, which is step number
20 four. Either the defendant's going to get it or the
21 plaintiff's going to get it. And I think it can be either
22 way. The plaintiff can have the hospital release it to the
23 defendant or the plaintiff can get it. So, you know, that, in
24 my mind, is an open question, and I think it can go either
25 way.

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1 The problem that I see, and here's where I struggle a
2 little bit, I don't think it's fair for the defendant to say
3 we think the plaintiff should have to get it, store it,
4 maintain it, make sure it's safe, and just hang on to it for
5 as long as it takes until someday we might want our half. And
6 if they do something with it, lose it, don't store it the way
7 we like it, then we're going to file a spoliation motion
8 against them. And we're not going to tell them how we want
9 them to keep it, we're not going to tell them how long we want
10 them to keep it, we're not going to say anything, but it just
11 better be the way we want it five or 10 or 20 years from now
12 when we want it. I don't think that's right. That's not
13 fair.

14 I don't think it -- on the other hand, I don't think
15 it's fair for the plaintiff to say, "Well, we don't have any
16 duty to preserve this, you know. They -- you know, they can
17 go get it if they want to." I don't think that's right,
18 either, because you're the one who filed the suit and you're
19 the one who said the mesh is defective. So the mesh is in
20 your client's body. The mesh is coming out of your client's
21 body. You're the one who says it's defective. Yes, you do
22 have some obligation to preserve it.

23 So, you know, where do we go from here? That's -- I
24 can get us up to the step where now it's the hospital's or the
25 surgery center's going to turn it over to one of you two.

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1 Where do we go from there?

2 MR. ANDERSON: Your Honor, if I may.

3 THE COURT: Yes.

4 MR. ANDERSON: Steelgate obviously is -- the reason
5 that I got the affidavit from Kate Grayson is because
6 Steelgate has done this in multiple of their MDLs and they've
7 been doing this for a long time and they do their job very
8 well. And so, in our mind, the best entity to handle the
9 interface between the litigation and the hospital is a
10 third-party company that's a biorepository just like Steelgate
11 is.

12 THE COURT: All right. Let me ask Mr. Thomas.

13 MR. ANDERSON: Yes.

14 THE COURT: What is your problem with having it go to
15 some third-party repository?

16 MR. THOMAS: I have no problem with that at all, Your
17 Honor.

18 THE COURT: Okay.

19 MR. THOMAS: May I speak briefly about some of your
20 prior comments?

21 THE COURT: Yes.

22 MR. THOMAS: Important to Ethicon, and I think you
23 covered this, is that this issue apply to all cases and not
24 just trial candidate cases, as proposed in some of the orders.
25 Is that fair?

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1 THE COURT: It does have to apply to all cases, and
2 I'll tell you why, because we don't know what's going to
3 happen to these cases.

4 MR. THOMAS: Thank you.

5 If our papers were read to suggest that we believe
6 the burden should be on the healthcare providers and that we
7 were imposing some burden on them beyond what they do every
8 day, that's not our intention at all.

9 The Grayson affidavit, when I read that, I agree with
10 everything that she said in terms of you cannot tell the
11 healthcare providers what to do.

12 The letter we attached in response to the motion was
13 because my name was included in that letter to contact, should
14 the healthcare provider have any questions about preservation
15 of the mesh. I didn't want my name to be in any letter going
16 to a healthcare provider, having some plaintiff's -- some
17 healthcare provider call me about some other client's mesh
18 because, A, I don't think I have any business making any
19 comment about it, and, B, I think the plaintiff's counsel
20 would be reasonably upset if I had some say over disposition
21 of that mesh. So that's the reason for the attachment of that
22 letter, that and that alone.

23 The big issue, Your Honor, we haven't discussed at
24 all, and it's the method of preservation of the mesh. As you
25 are aware, the AMS order -- I have them all here if you'd like

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1 to see them. The AMS order requires the division of the mesh
2 and that each party instruct the healthcare provider about the
3 method of preservation for that mesh. That's obviously not
4 workable for all kinds of reasons. You're going to have two
5 people calling a hospital, one person saying preserve it this
6 way, another person saying preserve it this way.

7 The Bard order requires the healthcare provider to
8 store pathology as they usually do, but whatever explant they
9 retain to be stored in saline and refrigerated. Again, that
10 is a whole different -- may be a whole different method of
11 preservation beyond what the hospital's doing on their own,
12 according to their policies.

13 The proposed procedure by the plaintiffs in the
14 Ethicon case requires that the explants be stored in formalin
15 which is a 10 percent formaldehyde solution. And the issue
16 with that method in an order, as far as Ethicon's concerned,
17 is we're concerned that that blesses a method of preservation
18 of the mesh that we believe is inappropriate for certain of
19 the analytical tests that are being performed on the mesh.
20 Let me give you an example.

21 In the Lewis case -- we have had three cases so far.
22 The Lewis case, which the Court is very aware, we did
23 everything right as far as I'm concerned. The mesh came in,
24 the mesh was -- our experts met, split the mesh, they took
25 theirs, we took ours. It was in the state that it was in.

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1 Dr. Jordi, who's plaintiffs' expert, conducted a
2 number of analytical tests on that mesh. We got his report
3 and saw what he did, analyzed his methods. We believe that
4 the formalin used in the preservation of that mesh is a
5 significant confounding factor to the results that he offered
6 at trial. So, our position is that the formalin reacts with
7 proteins that are on the mesh after implantation and forms a
8 hard outer shell around the mesh so that when you're doing
9 analytical chemistry on the mesh, you have this hard outer
10 shell that is a confounder to the analytical chemistry.

11 Our experts cleaned the mesh. They suggest that
12 cleaning is improper, didn't need to be done, done with the
13 wrong things, and I'm oversimplifying but that's basically it.

14 In the Huskey case, there is no mesh.

15 In the Edwards case, the mesh was, in our judgment,
16 mishandled by the plaintiffs' experts, the subject of
17 destructive testing, and we have affidavits, reports from our
18 experts, that say that the handling of the mesh compromised
19 our ability to do the analytical testing that we wanted to and
20 respond to the claims that the mesh is degraded.

21 I'm sorry for the long windup, but it's a necessary
22 predicate to understand that the method of preservation is all
23 important in the kinds of tests that are ultimately conducted
24 on the mesh, such that if the mesh is stored in saline, you
25 don't have this formalin outer shell that we've talked about.

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1 There has been some suggestion that the mesh be flash
2 frozen. That creates its own issues.

3 Storing in saline, as the Court's observed, may be a
4 biohazard and there are other issues there.

5 What Ethicon can't have -- at least our contention
6 is, excuse me -- we'll have whatever you tell us we have to
7 have -- is that we -- a Court-blessed method of preservation
8 for the mesh.

9 Plaintiffs are the ones in charge of what tests
10 they're going to conduct on this mesh, and it's changed across
11 MDLs. Some plaintiffs' experts conduct certain tests. Other
12 plaintiffs' experts conduct other tests. We don't know
13 until -- what those tests are, whether the preservation
14 measure taken by the plaintiffs affects the results of those
15 tests.

16 THE COURT: Well, here's what I'm proposing, though.
17 Step three is the healthcare provider -- healthcare provider
18 preserves this mesh when it's removed from the patient's body.
19 Healthcare provider preserves it any way the healthcare
20 provider wants to in compliance with its own policy. Then
21 it's turned over to you two somehow. Say it's sent to a
22 third-party repository, and, immediately upon receipt, it's
23 split in half. You can take your half, you can put it in
24 anything you want to put it into. They can take their half
25 and put it in anything they want to put it into.

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1 MR. THOMAS: The problem with -- I'm sorry.

2 THE COURT: But the bottom line is no one is going to
3 tell the healthcare provider how to preserve it from the time
4 it's removed from the patient until the time it gets into your
5 hands.

6 MR. THOMAS: Two things about that, Your Honor.

7 First of all, it's my understanding -- I don't have
8 the experience you do or Mr. Anderson -- it's my understanding
9 that the default is going to be to put this mesh in formalin
10 to preserve it, to fix it. Once it goes into formalin, our
11 experts tell us, and we've submitted this information to the
12 Court, that compromises our ability to do the analytical
13 chemistry tests that we think are necessary to rebut the
14 claims of degradation. Plaintiffs disagree with that.

15 The second point is if for some reason the healthcare
16 providers do not put it in formalin before they transfer it to
17 the third party and it's split at that time and plaintiffs
18 preserve one way and we preserve another way, then there is a
19 significant issue about whether we will be able to replicate
20 the same kinds of tests conducted by the plaintiffs because
21 there will not be tests on mesh preserved in the same manner.

22 THE COURT: But I -- you know, I think what you're
23 talking about here is an issue that's never going to be
24 resolved. You're going to be fighting about -- this is what
25 you'll be fighting about at trial. I don't think that can be

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1 fixed. You're going to be arguing at trial over who has
2 tested this mesh the right way, who preserved it the right
3 way, whose tests are accurate and whose tests aren't. I mean,
4 that's what you're going to be fighting about at trial, I'm
5 sure. And I'm not sure that that can ever be removed from the
6 litigation.

7 MR. THOMAS: And you see, that's basically my point
8 in our papers. I tried to make it. I want --

9 THE COURT: So what's wrong with this plan? Let the
10 hospital decide how to preserve it. Send it to a third party.
11 It's immediately divided. You do what you want with your
12 half. They do what they want with their half. You can say
13 what they did with their half is wrong, it doesn't allow for
14 the proper testing. You can attack the way they've tested it.
15 They'll do the same with what you've done. You bring your
16 experts in, they can fight. You can take a fourth, one-half
17 of your half, and you can replicate their tests if you want so
18 that you can undermine their results. You can do whatever you
19 want with your half. But I don't know that there's going to
20 be any way -- I mean, how am I supposed to tell you -- I don't
21 know who's right. I don't think I'd ever be able to decide.
22 I'm not a scientist. I don't know whether it's formalin or
23 saline or whether they ought to just stick it into a container
24 with no kind of preservative or no kind of liquid. So I can't
25 make a decision as to who's right about this.

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1 MR. THOMAS: If I may, Your Honor.

2 THE COURT: Yes.

3 MR. THOMAS: At the same time, by holding in an order
4 that whatever the hospital's method of preservation is is
5 adequate, prejudices perhaps our argument later that the
6 preservation method does not permit the proper analytical
7 chemistry analysis by either their expert or our expert.

8 THE COURT: Why does it prejudice that argument?

9 MR. THOMAS: Because plaintiffs, if they wanted to
10 test the mesh in a way that they believe can prove that mesh
11 degrades, I think it's their responsibility to have the mesh
12 preserved by the healthcare provider in the way that allows
13 those tests to be conducted.

14 THE COURT: You show me one -- one case that says
15 that.

16 MR. THOMAS: It's a matter of -- Your Honor, of --
17 the analogy I'll make is an automobile accident. If you have
18 an automobile accident, which is a lot of cases on this, if
19 you're going to have a crashworthiness case, the plaintiff has
20 a duty to preserve the car as best they can. It's not the car
21 altered. It's not the car repaired. It's not the car
22 preserved. It's the car as it existed after the wreck.

23 THE COURT: So, but wait a minute. So, that means
24 that they have some kind of duty to notify, for example, all
25 of the tow-truck companies around the area that if they ever

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1 get into an accident, this is the way I want you to tow my car
2 away from the scene.

3 MR. THOMAS: But --

4 THE COURT: And this is how I want you to store my
5 car on the lot until I can take possession of it.

6 MR. THOMAS: But to the extent that anybody has
7 altered that vehicle as a part of the process, that's very
8 much part of the case.

9 THE COURT: Well, getting it towed away from the
10 scene is going to alter it in some way. I mean, I think that
11 when the patient is laying on an operating room table and the
12 hospital's removing the mesh from her body and putting it in
13 some sort of a jar to send it to the lab, I don't think she
14 does have control over what the hospital is doing at that
15 point. And I don't think that the lawyer or me has any real
16 right to tell the hospital we have this lawsuit pending so we
17 expect you to vary from the policy that you follow in every
18 other case and we want you to do this because we're afraid, if
19 you don't do it this way, we may not be able to test the
20 specimen the way one of the parties wants to test it. I just
21 don't think we can do that.

22 The hospital has a right to operate its business the
23 way that it believes it needs to be operated after it has
24 drafted these policies based on time, hours, research,
25 investigation, best practices, standards, government

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1 regulations. They've come up with these policies of how
2 they're supposed to handle the specimens. And I don't -- I
3 don't feel that I or Mr. Anderson or you or anyone has the
4 right to go in there and say, "Now, I know you've got 25
5 surgeries you're going to do today, but I want you to
6 remember, in this one case, when you take that mesh out, make
7 sure you do this, this, this, and this for my lawsuit." I
8 just -- I don't -- I can't buy that. I think we're going to
9 have to let the hospital do what the hospital normally does.

10 Now, I'm not sure that the hospital does, in fact,
11 put all these things in formalin. I'm looking at some
12 policies I printed off. I see, for example, when they were --
13 for example, with bullets, when they remove bullets which is a
14 foreign body, they don't put it in anything. They wrap it in
15 a piece of gauze and stick it in a jar. That's what one
16 hospital does. Another one puts it on a Telfa pad that's been
17 soaked in saline. I mean, I don't know that every hospital
18 drops these things in formalin. I don't know what they do.

19 You know, I don't know that you can't -- I don't know
20 that Mr. Anderson would have an objection if you said, "Well,
21 what about if we make a request in this particular case that
22 they put it in saline?" Maybe he'd say, "Okay. Well, we'll
23 let you do it in five cases" or "in these five cases, you can
24 do that." I mean, maybe he would agree to do that in a few
25 cases. I'm not sure the hospital's going to agree to do that

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1 but --

2 MR. THOMAS: The problem is, Your Honor, we don't
3 know the proper method of preservation until after the tests
4 are conducted.

5 THE COURT: Well then, I don't know what you're
6 asking me to do.

7 MR. THOMAS: Only that it's plaintiffs' burden to
8 preserve it in the way most appropriate for their testing so
9 that we're not prejudiced when we come back --

10 THE COURT: Well, that's just --

11 MR. THOMAS: -- and I don't want -- in an order
12 blessing formalin preservation, for example, which is what
13 their proposed order requires.

14 THE COURT: I'm not blessing anything. I'm saying
15 what would happen is that it would be whatever the hospital
16 normally does.

17 MR. THOMAS: Then if -- I understand that. We'll
18 take that.

19 THE COURT: I think what -- what I disagree with in
20 Ethicon's position is exactly what the plaintiff is saying,
21 this gotcha mentality. "We don't want to tell you what to do,
22 we don't want to say anything, but it better be right when we
23 want it. It better be the way we need to have it when we want
24 it. And if it's not, it's your fault." And you can't do
25 that.

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1 MR. THOMAS: That was not the intention of the
2 papers, Your Honor.

3 THE COURT: But it sounds like that even as you're
4 speaking now.

5 MR. THOMAS: No, the intention of the papers, Your
6 Honor, is -- is for the plaintiffs to determine what's the
7 appropriate condition of the mesh for the tests that they want
8 to run so that we get the appropriate condition of the mesh
9 when we want to replicate their tests. That's all that it is.
10 If down the road -- well --

11 THE COURT: So you're going to get the mesh. If this
12 is the way we do it, where now the healthcare provider has now
13 taken it out of the patient's body, put it in whatever they're
14 preserving it in, and now they're going to hand it over to
15 whom? The plaintiff's attorney?

16 MR. ANDERSON: Can I just address this, please, Your
17 Honor?

18 THE COURT: Yes.

19 MR. ANDERSON: I want to address your immediate
20 question and maybe some other things might be helpful in
21 coming to our conclusions here.

22 When we -- when we had tried to come up with a
23 protocol, we started about a year ago, and when we filed the
24 one on September 6 last year, it had to be withdrawn because
25 there was a problem with sample size. But, in absence of the

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1 protocol, what we have done now in three bellwethers with Burt
2 Snell, defense counsel at Butler Snow, is if there is a
3 surgery, the hospital does what they do. Steelgate interfaces
4 with the hospital and says you have a surgery coming up or you
5 just had a surgery, whatever the case may be on timing. We
6 want to retrieve it from you in whatever means you keep it.
7 The reason that formalin is there is because formalin is best
8 practices. That's why hospitals all across this country do
9 it. It's best practices under all of the pathology labs, all
10 the administrative codes, et cetera. That's why they do it,
11 because it is the best preservative that's there.

12 Saline allows for bacteria. Saline destroys not only
13 the tissue but also in this case the fibers, and refrigeration
14 does. So that's why they use formalin in the first place.
15 It's a fixative.

16 So we receive it through Steelgate. Steelgate
17 retrieves it in the bottle. Steelgate then sends out a
18 photograph of it and says, "Mr. Anderson, we have received
19 Ms. So-and-so's mesh." Then I immediately reach out to
20 defense counsel and say, "Steelgate has Ms. Lewis's or
21 Ms. Batiste's mesh. Please let us know when your experts can
22 come to Jordi Labs for the dividing of the mesh." They get
23 back with us and say, our guys, Dr. Ong and Dr. Thames, have
24 been sent every time, and they are invited to Dr. Jordi's lab,
25 and they all get there together. Nothing has been opened.

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1 They photograph the shipping box from Steelgate. They open
2 that. They photograph the bottle when it comes out. Then
3 together they go into the lab, they pull it out with tweezers,
4 they divide it on a splitting machine, and they take the
5 formalin that's in the bottle, they create another bottle with
6 the same formalin, so that then their experts, Ethicon's
7 experts, take their bottle and they either ship it back to
8 their laboratory in a biohazard bag or they can take it with
9 them. Typically, they ship it because of flights and going
10 through security. And then they are welcome to do whatever
11 testing they want; we do whatever testing we want.

12 THE COURT: So is it always formalin?

13 MR. ANDERSON: It's almost always formalin. There
14 have been a few rare instances where it's just dried mesh,
15 like you said, sometimes they put --

16 THE COURT: Right, just put it in there.

17 MR. ANDERSON: No one stores it in saline that we've
18 seen. It's a preferred method, and it's not just in the
19 United States. It's around the world.

20 And if I could just -- I need to correct something
21 for the record. And it could be because Mr. Thomas is just
22 not aware of it. But, as plaintiffs put in our papers, that
23 part of the Bard order about the saline, I became involved
24 with Mr. Wages on that, and they since changed that because we
25 had experts, both polymer scientists and pathologists, who

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1 said please do not do that. Saline will destroy the tissue,
2 and it will destroy it in the refrigerating, it will destroy
3 the mesh. Then it's not usable for any of us. So AMS agreed
4 because they didn't have any experts who came back with
5 anything other than that, and they said, okay, how about if we
6 at least ask the hospital if they're willing to put half of it
7 in saline and half of it in formaldehyde. They agreed to
8 that, but I still think it creates more problems and you're
9 putting more burden on the hospital and delay and you're
10 getting two different requests. But they did have to back off
11 of that position because the experts, which went unopposed,
12 said you can't store this in saline. Saline allows bacteria;
13 formalin does not. So that's why we had said, look, we don't
14 even want to put the impetus on the hospital to say it has to
15 be in formaldehyde. We have to just say to them, "Follow your
16 normal operating procedures."

17 THE COURT: Right.

18 MR. ANDERSON: And then -- and we can have Steelgate
19 collect it. Steelgate can then have it divided.

20 THE COURT: So, it seems to me, Mr. Thomas, that if
21 at some point Ethicon decides that they would like to get a
22 specimen in some other kind of medium, some other sort of
23 preservative or medium, then the thing to do is to speak with
24 the plaintiffs' counsel and say, with this particular patient,
25 can we approach the facility and see if, in this case, we can

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1 have it put in formaldehyde or we can have it put in something
2 other than formalin. But at this point you don't -- there
3 isn't anything that you really want it put in, that I'm
4 hearing you articulate.

5 MR. THOMAS: I'm sorry. I just don't think it's our
6 burden to choose that.

7 THE COURT: Well --

8 MR. THOMAS: With the Court's orders today, the
9 findings today, that applies to all cases.

10 THE COURT: Um-hum.

11 MR. THOMAS: And it does not bless formalin as a
12 preferred method of preservation, and we're just going to
13 follow whatever the hospitals do --

14 THE COURT: Right.

15 MR. THOMAS: -- absent any kind of agreement. I
16 think that we can agree to the rest of it, Your Honor. I
17 really think that's something that we can work out.

18 THE COURT: Okay.

19 MR. THOMAS: Those are the two issues that concerned
20 us the most, is our limitation on the cases to which the rule
21 applied and the method of preservation. I understand the
22 Court's rulings. With the Court's permission, I think that
23 Mr. Anderson and I can work out the details.

24 THE COURT: All right. So the rest of it, I would
25 think, would be pretty easy to work out. I mean, you're not

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1 arguing over the expense of preservation. You're willing to
2 put it in a third-party repository. You're willing to share
3 the expense of storing. And you each want part of the
4 specimens, right? You each want -- I mean, nobody wants --
5 nobody wants to just turn it all over to the other side,
6 correct?

7 MR. ANDERSON: That's correct.

8 THE COURT: So all the rest of it ought to be pretty
9 easy. Yeah, I mean I'm thinking, unless and until there's a
10 specific request for a specimen to be put in something other
11 than what the healthcare provider normally does, I don't know
12 why -- I don't know what else you would do, other than to say
13 it just has to be done as the healthcare provider normally
14 does it.

15 You know, to me, that's just like picking up a car,
16 to use your analogy, after it's been towed to the junkyard.
17 You don't try to control how it's towed there and you don't
18 control how it's stored there. You just go get it once it's
19 there and then you start preserving it the way you want it
20 preserved. But, you know, up to that point, you don't really
21 have a lot of control over it, right?

22 MR. THOMAS: I don't know the answer to that. I
23 don't know the extent to which plaintiffs' counsel could
24 influence the method of storage of the implant after it's
25 removed from the body. I understand the Court's findings in

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1 that regard but I don't know the issue well enough to --

2 THE COURT: Well, and I think they might be able to.

3 MR. THOMAS: Exactly.

4 THE COURT: If -- but only if -- why would they do
5 anything other than what the norm is, unless you said to them,
6 I specifically want this done this way? Then they have
7 something to do other than what would normally be done. But
8 there's no reason for them to start trying to change what the
9 hospital or the surgery center normally does unless there's a
10 specific request for that. And I don't hear you making any
11 request. You just -- all you're saying is, well, they're
12 just -- they just need to do it in the right way but you won't
13 tell them what that way is. So it seems like then whatever
14 the hospital is doing is the way it has to be done.

15 MR. THOMAS: And we've come a long way, as far as I'm
16 concerned today, in what the Court's decided, and the message
17 that I hear is that it applies to all cases --

18 THE COURT: Yes.

19 MR. THOMAS: It's whatever the hospital provides,
20 unless the parties agree otherwise.

21 THE COURT: Right.

22 MR. THOMAS: And to the extent in an upcoming case we
23 want the plaintiffs to request something different because of
24 the kind of testing we want to perform, we could make that
25 request. Perhaps that's the best way --

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1 THE COURT: And try to --

2 MR. THOMAS: -- to proceed before the Court again.

3 THE COURT: Right. And try to agree to something
4 before you would come back and ask for -- yeah. And then, you
5 know, ultimately, even then, Mr. Thomas, it's still going to
6 rely upon the hospital to do it --

7 MR. THOMAS: Absolutely, understand that.

8 THE COURT: -- and I -- as I said, I don't really
9 feel comfortable trying to go in and tell a hospital that they
10 have to -- that they are commanded to deviate from their
11 normal procedure unless there's a real compelling reason to do
12 that. So I would want to have, for example, some kind of hard
13 and fast scientific evidence telling me that the way this
14 hospital's doing it is really damaging the specimen so much
15 that it's not useful for this case. Otherwise, I wouldn't
16 feel comfortable going to a hospital and saying, I order you
17 to deviate from your policy, your best practices, and do it
18 this way for this lawsuit.

19 MR. THOMAS: And I understand that, Your Honor. And
20 I don't think that we ever contemplate asking you to order a
21 hospital to change its procedures.

22 THE COURT: Okay.

23 MR. THOMAS: That's not what I was getting at.

24 THE COURT: All right.

25 MR. THOMAS: It would be an effort --

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1 THE COURT: A request to try to work with --

2 MR. THOMAS: -- to ask plaintiffs to do certain
3 things.

4 THE COURT: Okay.

5 MR. THOMAS: And they would ask the hospital, and the
6 hospital would say --

7 THE COURT: "Yes" or "no."

8 MR. THOMAS: "Yes, we can do that" or "No, we can't."

9 THE COURT: All right.

10 MR. THOMAS: I don't think that we'd ever come back
11 and suggest to the Court that you tell the hospital what to
12 do.

13 THE COURT: Okay.

14 MR. THOMAS: That's not what I had in mind.

15 THE COURT: All right.

16 MR. ANDERSON: May I speak to that, please, Your
17 Honor?

18 THE COURT: Yes.

19 MR. ANDERSON: Because I do have a real concern. And
20 Kate Grayson's affidavit spells some of this out, and just
21 through working with hospitals, practically speaking, there
22 are problems when you go to the hospital and you say please
23 divide this one-half into saline and one-half into formalin,
24 which is the way they normally do it, because then what
25 happens is a delay is put on that. It then has to go to risk

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1 management. After it goes to risk management, it gets pushed
2 out sometimes to outside counsel.

3 Great case in point, the *Batiste*, *Lewis* cases. We
4 put this extra request in there that they do these things, and
5 it took four months to get it back.

6 And, in some instances, we now have two things
7 happening: Either after those months and months of waiting
8 for this to come in, the risk management or the outside
9 counsel says, "We're not following it." That's number one.

10 Now we've had in two instances surgeons who are
11 saying, "I'm not going to perform the surgery if you're going
12 to make my hospital do this," and they have met with their
13 board and said, "We're not going to do the procedure." So
14 this is -- it can be very draconian if we go in and start
15 saying, "Split this up." Even this simple request, it sounds
16 like we're just going to come in and ask them if they'll do
17 it. We're not ordering it. That seems to be what I'm
18 hearing. That simple request still has to be run through risk
19 management and they have to look at their liability, they have
20 to run it through their internal board and outside counsel,
21 and it is taking a very long time and is causing them to shy
22 away because they say, "Now we have got to put more people on
23 this," et cetera.

24 So the larger facilities, especially UCLA, University
25 of Texas Southwest, these facilities are now saying, "You know

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1 what? We're going to have our own protocol for you, and it is
2 going to delay us getting mesh back to you."

3 So I have real concerns because I know that just
4 hearing what's going on today, I know what's going to happen.
5 I'm going to get a request from Mr. Thomas, "Would you please
6 reach out to these hospitals and tell them that we would like
7 our half to go into saline?" And it is going to be a real
8 problem, Your Honor, because that's not best practices.
9 That's number one.

10 Number two is, okay, now if we start to say, "Could
11 you put part of it in saline, part of it in formalin," we are
12 going to say at trial saline is not even the way that
13 pathologists preserve the material. And, in fact, the
14 hospital's normal routine is to put it in formalin. However,
15 in order to say that, we're going to have to go in and depose
16 someone at the hospital and that's, as you know, when inhouse
17 counsel starts to get their backs reared up and they say, "You
18 know what? You're not going to come in and start deposing all
19 of our people" --

20 THE COURT: Wouldn't your expert be able to say that?

21 MR. ANDERSON: What's that?

22 THE COURT: Wouldn't your expert be able to say that,
23 I mean, that's how they do it at hospitals? I mean --

24 MR. THOMAS: Can I speak to that, Your Honor?

25 THE COURT: Yeah, but we're getting -- we're getting

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1 off --

2 MR. THOMAS: Because we're borrowing trouble now.

3 THE COURT: Yeah, really.

4 MR. THOMAS: This is not something that's even ripe
5 before the Court.

6 THE COURT: No, I know.

7 MR. THOMAS: That's a long ways down the road, if it
8 ever comes.

9 THE COURT: I wouldn't worry about that yet. I mean,
10 and I can tell you, you know, that was one of the advantages
11 to have inhouse counsel because it would have taken me about
12 probably an hour to say no, we're not doing that. Because,
13 you know, I mean, as inhouse counsel to a hospital, there was
14 never a good reason to deviate from a standard policy just to
15 help somebody out in a lawsuit that we had no -- no
16 involvement in because all it ever did was come back to bite
17 us. Because then if we didn't do it right, which happened,
18 you know, because people were busy, and so they'd forget that
19 this was the case we were supposed to do something special on,
20 and then it was just nothing but aggravation after that. So I
21 wouldn't be surprised if people didn't want to cooperate. You
22 know, maybe you would have better luck in a surgery center, a
23 smaller facility, you know.

24 But, as Mr. Thomas says, that's not in front of us
25 right now, and we don't need to worry about it at this point,

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1 and maybe he'll find out, as you've said they found out in
2 Bard, that saline is no use, either. And I don't know that
3 formaldehyde is going to be any different or any better than
4 formalin, so we won't --

5 MR. ANDERSON: Basically the same.

6 THE COURT: Yeah. We won't worry about that at this
7 point then.

8 MR. ANDERSON: I guess my point was, Your Honor,
9 there's going to be a spillover effect if we start to go to
10 these hospitals asking them for special treatment because it's
11 the exact same --

12 THE COURT: Well, and the answers are they're not
13 going to do it anyway. I mean, really, you know? Once they
14 go to their lawyers, I mean, you know lawyers won't do
15 anything. They won't do anything.

16 MR. ANDERSON: That's my fear, though, is that
17 nothing happens and it gets delayed, delayed, delayed.

18 THE COURT: Right. And that's a risk that you take.
19 And I don't think that Ethicon is going to want to do that.

20 And, you know, Mr. Thomas, you're going to have all
21 your arguments that even though that is a standard way that
22 they're preserved, that doesn't mean that it doesn't have
23 negative effects on the mesh and it doesn't mean that the
24 results then of the testing aren't skewed. I mean, you still
25 have that argument, that these tests are not accurate because

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1 of the formalin. I mean that, to me, is still a valid
2 argument that you have. Right?

3 MR. THOMAS: I would agree --

4 THE COURT: Maybe you don't want to put them in a
5 medium that would allow you to have what you would consider to
6 be untainted test results. Maybe it's better to be able to
7 say that all the test results are tainted, right?

8 MR. THOMAS: Just trying to keep all my options open,
9 Your Honor.

10 THE COURT: Leave your options open.

11 Hey, as long as I have you all here, there are a
12 couple of other things I want to talk to you about.

13 One thing has to do with, and I may have forgotten
14 all my folders now. They're more -- these are more sort of
15 administrative issues for me than anything else.

16 These motions that Ethicon has been filing lately,
17 these things about meet and confer or, in the alternative,
18 motions for protective order. Do you know what I'm speaking
19 about, Mr. Thomas?

20 MR. THOMAS: I don't, Your Honor. I'm sorry.

21 THE COURT: There's, I think, four or five of them
22 pending right now. And they're entitled --

23 (Discussion held off the record between the Court and
24 the Deputy Clerk.)

25 THE COURT: In any event, they are called things like

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1 Ethicon's request to meet and confer or motion for protective
2 order -- in the alternative, motion for protective order.

3 MR. THOMAS: I'm going to make a guess. Is it with
4 respect to a couple of witness depositions or 30(b)(6) --

5 THE COURT: There is, yes, several. Response request
6 for meet and confer, in the alternative, motion for protective
7 order regarding notice for oral deposition, yeah, for
8 designated witnesses. Okay.

9 What I want to bring up about that, Mr. Thomas, is
10 that when these are styled this way, they are put into my
11 report as a motion for protective order. And we have a report
12 that's generated every six months, and there are certain
13 things that I have to do within that six-month period, and
14 then the motions are placed on that report and so now they
15 are -- they are in my window, and something has to be done
16 with them. And these are -- this is a national report.

17 MR. THOMAS: I understand.

18 THE COURT: So every time the word "motion" is in a
19 style of anything, it now comes up onto my little report.

20 MR. THOMAS: Can I -- I've not read those precise
21 motions, but my guess is that that is to protect the record
22 for a 30(b)(6) deposition on the scope of the notice and
23 having a witness without any kind of pending protective order
24 motion pending.

25 THE COURT: Um-hum.

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1 MR. THOMAS: Binding testimony comes from that
2 witness, without the protective order.

3 THE COURT: Right.

4 MR. THOMAS: That's my -- that's my guess.

5 THE COURT: That was my guess as well when I saw it.

6 MR. THOMAS: And how would you suggest that we do
7 that to protect the record in advance of the deposition in
8 adequate time?

9 THE COURT: Yes. That's what I want to talk about
10 today. So if we can come up with something. I mean,
11 technically, you can't file a motion for protective order
12 until you've had your meet and confer. So, just by virtue of
13 the title, clearly, this shouldn't be filed as motions because
14 you haven't had the meet and confer because you're asking for
15 a meet and confer at the same time you're filing the motion
16 for protective order. So we've got to somehow be restyling
17 these so that the word "motion" isn't showing up in them. But
18 I understand what you're trying to do because under the rules,
19 if you have a pending motion for protective order, then the
20 deposition transcript can't be used at a trial until that had
21 been resolved. So I see what you're trying to do with that.
22 And I don't know.

23 Is -- are these -- is the reason that this is
24 happening because these are being scheduled in too short of a
25 time frame to get them resolved? Because this has just

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1 started. And I know you used to file just objections.

2 MR. THOMAS: And we decided, I think, or the Court
3 told us that the objections were not appropriate.

4 THE COURT: There is really no such thing as
5 objections, yeah. I knew, I knew that was my fault. I knew
6 that when I saw this.

7 MR. THOMAS: I'm really dealing kind of in the
8 abstract here because I don't have any idea what those motions
9 actually say.

10 THE COURT: Right.

11 MR. THOMAS: But is there a way -- well, perhaps the
12 way to do it is to talk with the plaintiffs' counsel to see if
13 we can work out something because that's going to be a
14 recurring issue because I know there are a number of
15 depositions they want to continue to take through the summer,
16 and I certainly don't want your -- your list to be too long
17 with motions.

18 MR. ANDERSON: May I propose this, Your Honor? That
19 we -- now that we know that this is an issue for Your Honor,
20 we will meet and confer on this, and then if we can't come to
21 something, we'll just do another call with you, like we have
22 so many times in the past, and see if we can't hammer it out
23 in a phone call.

24 THE COURT: We will try to figure out a way to
25 preserve this issue for you because I understand -- you know,

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1 I mean, I think it is something that we may need to discuss
2 because, on the flip side, I'm sure it will be problematic for
3 the plaintiffs if they take the deposition and then not be
4 able to use it at all because you've got this pending motion
5 for protective order. So I would think in most of these
6 cases, the big issues you're going to want to have resolved
7 before you take the deposition. I mean, I don't think anybody
8 wants to go take these depositions and not be able to use the
9 transcript at all. But, you know, yes, why don't you talk
10 about this.

11 I mean, number one, meet and confers have to take
12 place before you file a motion, right? I understand why
13 you're doing it. I understand that I instigated this. And,
14 you know, I realize what I said was correct but I said it
15 before I understood how the MDLs really work. Because you
16 know these things are so crazy that filing objections in these
17 MDLs might be the best way sometimes to approach the problems
18 you have with these depositions, although there is no such
19 thing as objections to notices of deposition in the rules.
20 And in a normal case, that wouldn't work. I see why you do
21 them in these MDLs, but right now I've got four -- I think
22 four of those pending, and at some point, if they aren't going
23 to actually develop into a full-fledged motion for protective
24 order, they'll have to be withdrawn or I will just have to
25 deny them at some point but, you know, that requires a long

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1 written opinion and I'd prefer not to have to do that if
2 there's really no -- I mean, I could probably deny them all
3 now, just because you haven't met and conferred, but I'd like
4 not to have -- I'd like to give you a chance to sort of figure
5 these out and if there is any issues, deal with them.

6 MR. THOMAS: Yes.

7 THE COURT: So if you wouldn't mind looking into that
8 for me, I'd appreciate that, Mr. Thomas.

9 MR. THOMAS: I will.

10 THE COURT: The other thing is we've got a few older
11 things also here that are pending. For some reason, these two
12 really old ones haven't showed -- are not showing up on my
13 report, and they should have already showed up. They should
14 have been on my last report. And I'm not going to bring this
15 to anyone's attention because I don't want them on there,
16 but -- and that's these -- the ones that we sort of had
17 following along with the spoliation, clarification motion, and
18 that hasn't showed up because that was titled a request for
19 clarification, so that really hasn't been spotted as a motion.

20 But there's this motion to deem requests or compel
21 that was filed by Ethicon, and then plaintiffs had filed a
22 similar motion to determine sufficiency of discovery, and
23 these were filed, I think, gosh, back in like January. And
24 those have sort of been grouped with that spoliation motion,
25 and I was going to have a hearing on all of those things at

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1 the same time. Where are we with that? Does anyone here
2 know?

3 MR. ANDERSON: No, I don't, Your Honor.

4 MR. THOMAS: I don't either, Your Honor, but I will
5 find out.

6 THE COURT: All right. I know that we had pushed
7 back the spoliation issue because that letter had been found
8 by Ethicon where one of the -- the document retention letters
9 had been withdrawn and so they were looking into that, and
10 then it just sort of disappeared off the face of the earth
11 but -- doesn't disappoint me, but I do need to get the things
12 resolved that are on here so -- all right.

13 And then the last thing that I have pending is the
14 Keeton motion, which is something I do have on my six-month
15 report and I will be getting an order out on soon.

16 But those other ones, if you don't mind looking into
17 those things for me, I'd appreciate it. Maybe it's about time
18 to have a status telephone call or something just to see where
19 we're at because you guys have a trial, what, in August?

20 MR. ANDERSON: Correct.

21 MR. THOMAS: August 22nd.

22 THE COURT: Right. So you may want -- I don't know
23 where you are with the spoliation and the requests and the
24 sufficiency of discovery which I think were requests for
25 admissions, I believe that that's what you were trying to

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1 figure out the sufficiency of. I don't know if you're going
2 to need those for your August case or not. But if you do, you
3 better get on it because I've got two weeks I'll be gone in
4 July.

5 So, all right. So if you don't mind looking into
6 those things. If you need the numbers of the motions and
7 whatnot, Laura has those.

8 MR. THOMAS: What two weeks are you gone in July,
9 Your Honor?

10 THE COURT: I will be leaving on the 11th.

11 MR. THOMAS: Okay.

12 THE COURT: And I will be back the twenty- -- let's
13 see -- the 26th, so the 27th would be my first day back. No,
14 28th. Yes, so I will be gone from Friday, the 11th, and I'll
15 be back on Monday, the 28th.

16 MR. THOMAS: I expect you would like to work these
17 out before you go, these issues.

18 THE COURT: Yes. That would be better, definitely.

19 Yes.

20 MR. ANDERSON: A couple of points of clarification,
21 if I could, Your Honor, just with going back to the pathology
22 protocol.

23 So, you know, there is 20-some-thousand filed Ethicon
24 cases.

25 THE COURT: Um-hum.

—Motion Hearing—

1 MR. ANDERSON: So we're talking about thousands and
2 thousands of women and lawyers and things like that --

3 THE COURT: Um-hum.

4 MR. ANDERSON: -- that are going to somehow get
5 notice that if you are going to have another revision surgery
6 or your first revision surgery, that you need to then, after
7 you've recovered from the surgery -- because a lot of times
8 it's a short time period between a doctor saying we're going
9 to take you in because you're in so much pain, sometimes it's
10 a longer period of time, but it's variable. And so a lot of
11 times we will be, as their counsel, relying upon them to tell
12 us that they've had a procedure. And many of them are in the
13 hospital for a few days and then they have six weeks of
14 recovery, et cetera. So there's going to be a lag in here
15 between us trying to get the protocol in the right form and
16 then get the notice out and then try to push that out to
17 thousands and thousands of clients. It is going to be a
18 logistical nightmare but we'll do it, per the Court's order.
19 So there's going to be a lag between -- because women are
20 having these done every day, right?

21 THE COURT: Um-hum.

22 MR. ANDERSON: So we have to try to figure out what
23 is a reasonable amount of time for us to expect that we'll be
24 able to comply with something if it's in the order of within
25 five days of your procedure. If we do that today, there's no

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1 way that -- there's going to be a huge gap of compliance, if
2 you would, with such an order. So we need to consider how
3 that -- when this is going to go into effect and to whom it
4 applies because I assume that this is a prospective order for
5 women in the future who are going to have mesh removed.

6 THE COURT: All right. Well --

7 MR. THOMAS: Your Honor, could I speak to that very
8 quickly?

9 THE COURT: Yes.

10 MR. THOMAS: This is not the creation of a new duty
11 today. This is a recognition of an existing duty that these
12 women have had since they've been involved in this litigation.
13 So Ethicon strongly believes that anything that's gone on
14 before today, case law explicitly provides that these people
15 have a duty to preserve whatever evidence might be
16 appropriate. We're just agreeing on a protocol or hoping to
17 agree on a protocol how to handle that issue going forward.

18 THE COURT: Um-hum.

19 MR. THOMAS: Not going back.

20 THE COURT: No, I do agree with that. I think -- I
21 think every one of these women who filed a case over the
22 transvaginal mesh should have known that if they had a surgery
23 related to transvaginal mesh, that they should have kept a
24 specimen, alerted their physician, if there was a specimen
25 removed related to that, that that might be evidence. I think

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1 they should have known that. I think their attorney should
2 have told them that. To me, that is simple, basic, basic
3 personal injury law. So, I don't -- I do not think that is
4 anything new. I really don't. I agree with Mr. Thomas 100
5 percent. I mean, that, to me, is just simple basic law.

6 So my thought of what you're saying here is I think
7 that there must be some way that you communicate with the
8 attorneys, the plaintiffs' attorneys. I think you need to
9 tell them that they need to tell their clients that if any of
10 them have a surgery scheduled or have had a surgery, they need
11 to notify the attorney, then the attorney needs to notify the
12 surgeon or the hospital or both, or the surgery center,
13 whatever, that they want the specimen. And just -- that's the
14 first step.

15 Then, as to picking up the specimen and getting it to
16 the third party, I think that you can take a little bit of
17 time to do, and I don't think that's going to be that big of a
18 deal. Because I think the hospital or the surgery center,
19 once you notify them that you want that specimen and that
20 you'll be coming to get it, they'll hold it for you. They
21 won't throw it away if they know you're going to come and get
22 it, as long as it's not a year from now, you know. They
23 just -- they'll throw it away if nobody says they want it, you
24 know.

25 MR. ANDERSON: So, in terms of an order or a protocol

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1 that ends up being a PTO, is the Court looking to the party --
2 I'm trying to get clarification on that. Are you --

3 THE COURT: What I'm going to do, I'm going to do an
4 order that says that I've ruled that this applies to all the
5 plaintiffs, that the plaintiffs have the obligation to notify
6 their attorney, and the attorney will have the obligation, the
7 plaintiff's attorney will have the obligation to notify the
8 defendants that there has been or will be a surgery in which
9 there will be a specimen or anticipates there to be a
10 specimen, that the specimen is going to be preserved by the
11 hospital according to its normal protocol, that the -- and
12 then that the parties are going to meet and confer and
13 determine how that specimen will be retrieved from the
14 hospital laboratory or surgery center and to whom it will be
15 sent, and then how it will be managed from that point forward.
16 So that's kind of what my -- and that you will then be
17 submitting to me your protocol to manage retrieval from the
18 facility to the third-party repository and how it's going to
19 be handled from that point after.

20 MR. ANDERSON: Okay. And just back to what you
21 said -- were saying a minute ago about that it was fundamental
22 that all these women know, many of these women had mesh that
23 was revised --

24 THE COURT: Um-hum.

25 MR. ANDERSON: -- or removed long before they

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1 retained an attorney.

2 THE COURT: Well, that's different. That's
3 different.

4 MR. ANDERSON: And there are other times when women
5 go in for a procedure and they had no idea that -- they went
6 in and the doctor did a clip, sometimes they'll take a little
7 piece, sometimes they won't. They don't know to immediately
8 notify us and say, "I think the doctor may have taken
9 something out of me," but -- and we -- I'm just trying to
10 explain to the Court from our position what we've heard time
11 and again from a lot of the women that do not know that
12 anything was removed because sometimes --

13 THE COURT: Well, but you know what spoliation -- you
14 know what the requirement is. It's when you know that there's
15 evidence that's material to a claim that's pending or that's
16 anticipated. If you don't know that you have evidence or you
17 don't know that you're going to file a claim yet, then you
18 don't have to retain it. But at this point people know that
19 there's -- you know, from the time they filed the claim or saw
20 a lawyer or, you know, I think, clearly, they had an
21 obligation to have retained or have made some effort to retain
22 the evidence.

23 And we don't have any spoliation motions in front of
24 us. They're not accusing anybody at this point of
25 intentionally trying to destroy evidence.

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1 All I'm saying, though, is that I would have thought
2 the very first time one of these plaintiffs went into a
3 lawyer's office, the lawyer would have said, you know, "Now,
4 if you have any kind of surgery related to this, make sure
5 that you tell your doctor to keep the specimen." I would have
6 thought that would be something that would have been part of
7 the normal spiel, you know, the first visit with the attorney.
8 I mean, I just can't imagine that it wouldn't be.

9 MR. ANDERSON: And part of the problem that we've run
10 into, Your Honor, is exactly that. We will get notice maybe
11 30 days after the surgery or two weeks after the surgery, and
12 all of the hospitals have different requirements. And then,
13 depending on which employees are there at the time, they may
14 have a procedure in place, but certain employees immediately
15 throw -- have tossed the mesh, even if they've had a policy
16 that they're supposed to retain it for a few days --

17 THE COURT: Well, then that's not going to be --

18 MR. ANDERSON: -- and so we've gotten --

19 THE COURT: That's not going to be your client's
20 fault. And you've got to figure too, Mr. Anderson, that, you
21 know, how many times are you actually going to have to produce
22 it? We don't know how many cases are going to go to trial.
23 It could be five. It could be 500. It could be 5,000. I
24 mean, we don't know sitting here today. That's why you've got
25 to keep it. That's why the order has to be that it's got to

—Motion Hearing—

1 be kept in all of them because we don't know, sitting here
2 today, how many will go to trial. We don't know who they will
3 be.

4 Judge Goodwin could remand all these cases, for all I
5 know. He could consolidate 500 cases. He could do what he's
6 doing in some of the other MDLs and have these waves of a
7 thousand cases, and we don't know which ones those will be.

8 So I can't very well say, "Well, you only have to
9 keep it in the current bellwethers." I mean, that would be a
10 very ineffectual order because we don't know what's going to
11 come six months down the road.

12 MR. ANDERSON: And I wasn't suggesting that by my
13 last comments.

14 THE COURT: No, I know. What I'm saying, though, is
15 I wouldn't worry. You're a big worrier. You worry too much.
16 You worry, worry, worry. You worry about all these things
17 that haven't even happened yet. You're going to die very
18 young if you don't stop that.

19 MR. ANDERSON: I only -- if we could trade "worry"
20 for "concern" because I'm the one who receives -- just like we
21 worry about our children because we hear what happens to other
22 children. We worry about them because we've seen what they've
23 done in the past. I worry and I bring these concerns to the
24 Court because they're not hypothetical; they are real. And
25 we -- and those of us who run these things have to hear this

—Motion Hearing—

1 all the time from the field, e-mails, calls, concerns, and so
2 we bring it to the Court because of those real concerns, not
3 worrying about something that may happen, but trying to adjust
4 now for things that have already happened to try to deal with
5 them better in the future.

6 THE COURT: Well, I think you know from my spoliation
7 order in this case that I'm pretty -- pretty down to earth. I
8 understand that things happen and people don't necessarily
9 intend to lose evidence. I mean, sometimes people just aren't
10 very smart about how they do things.

11 So, you know, I think, though, that they need to
12 be -- you need to get the word out. They should already be
13 doing this. And if it comes up that they haven't, we'll
14 figure out why and go from there.

15 MR. ANDERSON: Okay.

16 THE COURT: Okay?

17 MR. ANDERSON: Yes, ma'am.

18 THE COURT: Anything else?

19 MR. THOMAS: Not here, Your Honor.

20 MR. ANDERSON: Not from us, Your Honor.

21 THE COURT: All right. Thank you.

22 MR. ANDERSON: Have a great weekend.

23 THE COURT: You, too.

24 MR. ANDERSON: Thank you.

25 THE COURT: Thank you. Court is in recess.

—Motion Hearing—

(The proceedings concluded at 11:10 a.m.)

* * *

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the
record of proceedings in the above-entitled matter.



Carol Farrell, CRR, RMR, CCP, RPR
Realtime Systems Administrator
United States Court Reporter